

(2)

NO. 90-1023



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1990 TERM

WILLIAM KUNTZ, III,

Petitioner,

v.

SOCIETY BANK, NATIONAL ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the
Second District Court of Appeals for
Montgomery County, State of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner has stated the questions presented as:

1. Does the granting of an ex-parte pre-judgment attachment order against petitioner in favor of respondent deny due process?
2. Does the granting of an ex-parte pre-judgment attachment order against petitioner in favor of respondent, who is a national bank, deny equal protection?
3. Can the Courts of Ohio treat a resident of the State of New York as a non-resident when that citizen of the State of New York has substantial and ongoing contact and commerce within the community in Ohio?

Respondent contends that the Petition for Certiorari presents the following question:

Does this Court have jurisdiction to review constitutional challenges to a state trial court's issuance of a non-final, non-appealable prejudgment order of attachment where petitioner has failed to properly present the constitutional challenges in the state's judicial system?

**LIST OF PARTIES AND STATEMENT OF
AFFILIATED CORPORATIONS**

The parties to this proceeding are identical to the parties in the proceedings below. Petitioner is William Kuntz, III, Defendant/Appellant below. Respondent is Society Bank, National Association, Plaintiff/Appellee below.

Respondent Society Bank, National Association is a wholly owned subsidiary of Society Corporation. Respondent's only non-wholly owned subsidiary is Miami Valley Capital, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES AND STATEMENT OF AFFILIATED CORPORATIONS	II
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	V
I. STATEMENT OF THE CASE	1
A. FACTS	1
B. PROCEDURAL HISTORY	2
II. ARGUMENT	4
A. PETITIONER HAS FAILED TO SATISFY THE JURISDICTIONAL REQUIREMENTS OF 28 U.S.C. § 1257 TO ENABLE THIS COURT TO REVIEW THE STATE COURT PROCEEDINGS.	4
1. <i>Petitioner Has Failed to Properly Present or Preserve His Constitutional Challenges In The State Court Proceedings.</i>	4
2. <i>Petitioner Did Not Properly Appeal The Attachment Order In The State Court System So That The State Appellate Courts Never Had The Opportunity To Review Petitioner's Constitutional Challenges To The Attachment Order.</i>	5
B. PETITIONER'S PETITION FOR A WRIT OF CERTIORARI CHALLENGING THE VALIDITY OF A PREJUDGMENT ORDER OF ATTACHMENT HAS BECOME MOOT BECAUSE RESPONDENT HAS BEEN GRANTED A FINAL JUDGMENT IN ITS FAVOR ON THE MERITS.	8

	Page
III. CONCLUSION	9
APPENDIX:	
A. Common Pleas Court of Montgomery County, Ohio, Decision, Entry and Order Sustaining in in Part and Overruling in Part Defendant's Ob- jections to the Referee's Report	1a
B. Ohio Rev. Code Ann. § 2715.045	7a

TABLE OF AUTHORITIES

CASES	Page
<i>Michigan v. Tyler</i> , 436 U.S. 499 (1978)	7
<i>Murphy v. Hunt</i> , 455 U.S. 478 (1982)	8
<i>Webb v. Webb</i> , 451 U.S. 493 (1981).....	4-5, 7
<i>Pilgrim Distributing Corp. v. Galsworthy, Inc.</i> , 148 Ohio St. 567 (1947)	7
<i>Roach v. Roach</i> , 164 Ohio St. 587 (1956)	7
<i>John H. Spencer, Inc. v. Baker & Hostetler</i> , 38 Ohio App. 3d 117 (1987)	7

STATUTES

Ohio Const. art. IV, § 3(B)(2): Courts of appeal shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the courts of appeal within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.....	5
28 U.S.C. § 1257 (1990): Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of,	

	Page
or any commission held or authority exercised under, the United States.	4
Ohio Rev. Code Ann. § 2505.02 (Page 1989 Supp.): An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.	5
Ohio Rev. Code Ann. § 2715.045 (Page 1989 Supp.): Appended hereto as Appendix B	6
Ohio Rev. Code Ann. § 2715.44 (Page 1989 Supp.): Before judgment, upon reasonable notice to the plaintiff, the defendant may move to discharge an attachment as to the whole or any of the property attached. The motion shall promptly be heard and decided by the court.	6
Ohio Rev. Code Ann. § 2715.46 (Page 1989 Supp.): A party to a suit affected by an order discharging or refusing to discharge an order of attachment may appeal on questions of law to reverse, vacate, or modify it as in other cases; and the original action shall proceed to trial and judgment as though no appeal had been taken.	6

COURT RULES

Sup. Ct. R. 14.1(h): If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by

those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

IN THE
SUPREME COURT OF THE UNITED STATES
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No. 90-1023

WILLIAM KUNTZ, III,

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SOCIETY BANK, NATIONAL ASSOCIATION,
Respondent.

**On Petition for Writ of Certiorari to the
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Montgomery County, State of Ohio**

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

I. STATEMENT OF THE CASE

A. FACTS. Although the facts underlying the present litigation are not relevant to resolving Petitioner's request for a writ of certiorari, those facts are briefly summarized as follows:

Petitioner received possession of a check made jointly payable to "William Kuntz, III and his attorney Robert Manley", drawn by the Montgomery County, Ohio, Clerk of Courts, on its checking account maintained with Respondent (the "Clerk's Check"). The Clerk's Check was issued pursuant to an order of an Ohio Common Pleas Court Judge.

Without obtaining the endorsement of the co-payee, Robert Manley, Petitioner negotiated the item in such a manner so as to obtain all the proceeds of the Clerk's Check. Respondent debited the Clerk of Court's checking account for the full amount of the Clerk's Check.

A demand was subsequently made upon Respondent to re-credit the Clerk of Court's account because the item was paid contrary to the joint payee language of the Clerk's Check. Respondent complied with this demand and later filed suit against Petitioner to recover damages caused by his actions. The instant appeal involves an order issued during that litigation.

B. *PROCEDURAL HISTORY.* The procedural history of this case presents the real issue for consideration of Petitioner's request for a writ of certiorari. On October 5, 1989, Respondent filed its Complaint against Petitioner in the Montgomery County, Ohio, Common Pleas Court. On October 10, 1989, Respondent filed a Motion for Prejudgment Attachment, accompanied by the statutorily required supportive materials. Judge Meagher sustained Respondent's Motion and issued an Order for Prejudgment Attachment ("Attachment Order"). Attached to Petition for Certiorari as Appendix 1h. The Attachment Order attached certain assets of Petitioner located in Montgomery County, Ohio, as security for a judgment which Respondent may recover in the future. Petitioner did not request that the trial court discharge, modify or amend the Attachment Order.

Petitioner appealed the Attachment Order to the Second District Court of Appeals for Montgomery County, Ohio. Petitioner's Appeal was dismissed, upon Respondent's Motion, because, pursuant to state law, the Attachment Order was not an appealable order.

In dismissing the Appeal, the Ohio Appellate Court stated "Since the order does not determine the action nor prevents a judgment, the order appealed from is not a final appealable order." See Decision and Entry, attached to Petition for Cer-

tiorari as Appendix 1f. Petitioner's Application to Reconsider that Decision was denied by the Ohio Appellate Court.

Petitioner's Motion to have the Ohio Supreme Court certify the record and review the decision of the Appellate Court was "overruled and the appeal dismissed *sua sponte* for the reason that no substantial constitutional question exists. . . ." Entry, attached to Petition for Certiorari as Appendix 1a.

II. ARGUMENT

A. PETITIONER HAS FAILED TO SATISFY THE JURISDICTIONAL REQUIREMENTS OF 28 U.S.C. § 1257 TO ENABLE THIS COURT TO REVIEW THE STATE COURT PROCEEDINGS.

Petitioner has requested that this Court review a state court proceeding and contends that an order issued by a state court trial judge is constitutionally infirm. Respondent requests that this Court deny the Petition for Certiorari. Petitioner did not properly request that any state court consider his constitutional challenges and, accordingly, this court lacks the statutory ability to review his constitutional challenges.

1. Petitioner Has Failed To Properly Present Or Preserve His Constitutional Challenges In The State Court Proceedings.

The ability of this Court to review results of state court proceedings is limited by 28 U.S.C. § 1257, which states:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (1990). Simply put, this Court will only exercise its jurisdiction to review state court proceedings where the state court has decided questions of federal law upon the proper request of a party. *See Webb v. Webb*, 451

U.S. 493, 495 (1981). (Although *Webb* was decided prior to the enactment of the current § 1257, the current § 1257(a) is nothing more than the previous § 1257(3) which was applied in *Webb*, with minor modifications).

Additionally, in the petition for certiorari, it is incumbent upon the petitioner to "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; . . ." Sup. Ct. R. 14.1(h). *See also Webb*, 451 U.S. at 495. Because Petitioner failed to present his federal questions to the trial court, or comply with the Supreme Court Rules in his Petition, the Petition for Certiorari must be denied.

2. Petitioner Did Not Properly Appeal The Attachment Order In The State Court System So That The State Appellate Courts Never Had The Opportunity To Review Petitioner's Constitutional Challenges To The Attachment Order.

Petitioner is likely to argue that he raised his constitutional challenges in the state court system, in both the appellate court and the Ohio Supreme Court. However, Ohio law requires that the challenges first be raised in the trial court, which Petitioner failed to do. The initial grant of an order of prejudgment attachment is not appealable. Ohio's Constitution grants appellate courts only the ability to review final judgments or orders of trial courts. Ohio Const. art. IV, § 3(B)(2). *See also* Ohio Rev. Code Ann. § 2505.02 (Page 1989 Supp.) (Ohio's statutory definition of "final order"). Petitioner's Appeal in the Ohio system was dismissed because the Attachment Order was not a final, appealable order. Decision and Entry of Ohio Court of Appeals, p. 2, attached to Petition for Certiorari as Appendix 1f. Accordingly, the Ohio Appellate Court did not rule on Petitioner's constitu-

tional challenges because it did not have the jurisdiction, or the authority, to do so.

Ohio's prejudgment attachment statutes permit the issuance of an order of prejudgment attachment without notice or hearing if certain conditions are satisfied. See Ohio Rev. Code Ann. § 2715.045(A) (Page 1989 Supp.). Before the initial issuance of an order of prejudgment attachment can be appealed, the defendant is required to move the trial court to discharge the attachment order. See *Id.*, § 2715.44. The right of appeal of a prejudgment attachment order is outlined in Section 2715.46 which provides:

A party to a suit affected by an order discharging or refusing to discharge an order of attachment may appeal on questions of law to reverse, vacate or modify it as in other cases; and the original action shall proceed to trial and judgment as though no appeal had been taken.

Id., § 2715.46 (emphasis added). Thus, the prejudgment attachment system enacted by the Ohio Legislature permits appeal only of an order discharging or refusing to discharge a prejudgment attachment order — not the initial grant or denial of such an order. The order which Petitioner seeks review of is merely the initial grant of the attachment. The statute expressly protects Petitioner's due process rights by affording him a hearing upon request. However, in this case, Petitioner failed to request the hearing.

The system as enacted by the Ohio Legislature is consistent with traditional concepts of appellate review. An appellate court should review the propriety of a lower court's decision only after both sides have had an opportunity to affect that initial decision maker. However, the prejudgment attachment statutes, specifically Section 2715.045, envision ex parte orders. As a result, a trial court may issue an attachment order only after hearing one side's version of the applicable law and facts. However, by requiring the party adversely affected by the attachment order to begin his challenge to the

order in the trial court permits that court to make a full record on all issues, which may then be reviewed through the appellate process. *See Webb*, 451 U.S. at 500.

Few Ohio cases discuss the appealability of prejudgment orders of attachment. However, those few cases do so in the context of an order discharging or refusing to discharge the order — not the initial grant or denial of the order. In *Pilgrim Distributing Corp. v. Galsworthy, Inc.*, 148 Ohio St. 567 (1947), the Ohio Supreme Court stated “It follows that the decision on the motion to dissolve the attachment * * * is a final order and as such is appealable.” *Id.* at 573-74 (emphasis added). This statement was relied upon by The Ohio Supreme Court in a later case involving a different type of order. *Roach v. Roach*, 164 Ohio St. 587, 589 (1956). But cf. *John H. Spencer, Inc. v. Baker & Hostetler*, 38 Ohio App. 3d 117, 118 (1987) (dicta).

Petitioner is contending that the Order of Attachment violated his due process rights and denied him equal protection of the laws. Ohio law requires that, under the applicable statutes, the Petitioner assert his constitutional challenges in the trial court. However, by failing to present those issues to the trial court by requesting that the trial court discharge the Order of Attachment, he has failed to present or preserve his constitutional challenges to the Attachment Order for review by this Court. *See Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

B. PETITIONER'S PETITION FOR A WRIT OF CERTIORARI CHALLENGING THE VALIDITY OF A PREJUDGMENT ORDER OF ATTACHMENT HAS BECOME MOOT BECAUSE RESPONDENT HAS BEEN GRANTED A FINAL JUDGMENT IN ITS FAVOR ON THE MERITS.

The Petition should be denied for the additional reason that the issue is moot. The Attachment Order appealed from was a prejudgment order of attachment, which is designed to ensure that, under the appropriate circumstances, a plaintiff which recovers a judgment against a defendant will be able to satisfy that judgment because the defendant will be precluded from transferring or disposing of his assets. Respondent in this case requested that relief and the trial court determined that the statutory requirements had been satisfied.

On December 21, 1990, the trial court entered Judgment in Respondent's favor and ordered that Petitioner pay Respondent the sum of \$73,145.12 plus appropriate interest. See Decision, Entry, and Order, appended hereto as Appendix A. Respondent has certified that Judgment and has begun enforcement proceedings. Accordingly, as Respondent now has an Order of Judgment, there is no need for it to rely upon the Prejudgment Order of Attachment, and Petitioner's challenges to the validity of the Attachment Order are now moot. Petitioner's due process or equal protection rights can no longer be violated by the Attachment Order, which has been superseded by the final judgment in Respondent's favor. Therefore, this Court should deny the Petition for a Writ of Certiorari. Cf. *Murphy v. Hunt*, 455 U.S. 478 (1982) (appeal of denial of pretrial bail rendered moot due to intervening criminal conviction).

III. CONCLUSION

Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari. Petitioner has failed to present his constitutional challenges in the state judicial system such that this Court has the authority to entertain this appeal. The order initially appealed was not, under Ohio law, a final, appealable order. Under the statutory scheme enacted by the Ohio Legislature, Petitioner was required to assert his constitutional challenges in the trial court, which he failed to do.

Additionally, since the trial court has issued a final order granting Respondent its requested relief, the Attachment Order is no longer necessary and Petitioner's constitutional challenges are now moot.

Therefore, based upon the foregoing arguments and citations of authority, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY

**CASE NO. 89-3472
(Judge John M. Meagher)**

**SOCIETY BANK, NATIONAL ASSOCIATION,
Plaintiff,**

vs.

WILLIAM KUNTZ, III,

Defendant.

DECISION, ENTRY, AND ORDER SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S OBJECTIONS TO THE REFEREE'S REPORT

(Filed December 21, 1990)

This matter comes before the court on defendant's objections to the referee's report.

On February 7, 1989, this court issued an Order of Distribution in the case captioned *City of Dayton v. William Kuntz III*, Case No. 86-2439. The order required the Clerk of Courts to issue a check in the amount of \$73,145.12 payable to "William Kuntz III and his attorney Robert E. Manley," and to deliver the check to Manley. The Clerk complied with the order.

On or about February 10, 1989, Manley received the Clerk's check and forwarded it to defendant William Kuntz III, instructing defendant to endorse and return the check. Manley did not endorse the check.

Rather than comply with Manley's instructions, defendant

on February 27, 1989, took the check to plaintiff Society Bank's main branch and requested that it be exchanged for a cashier's check. Plaintiff complied with defendant's request.

The cashier's check issued by plaintiff contained two mistakes. First, the payee line read "William Kuntz III and his attorney," rather than "William Kuntz III and his attorney Robert E. Manley." Second, the remitter information identified the source of funds as defendant's savings account rather than the Clerk's account.

On February 27, 1989, defendant deposited the cashier's check into his savings account. The check was never endorsed by Manley, nor did Manley authorize any individual to endorse or negotiate the check on his behalf. Between February 27, 1989, and March 20, 1989, defendant withdrew the sum of \$72,619.93 from his savings account.

On or about September 14, 1989, plaintiff realized its mistakes and credited the Clerk's account in the amount of \$72,619.93. On September 22, 1989, this court issued an amended order of distribution, requiring the Clerk to pay Manley \$51,101.21. The Clerk complied with the amended order.

Plaintiff brought this action, seeking recovery of its payment of the Clerk's check to defendant. The referee heard the matter and issued her report on June 13, 1990. The referee found that defendant violated the court order of distribution, breached his presentment of good title to the Clerk's check, and received payment under a mistake of fact. Accordingly, the referee recommended that a constructive trust be imposed on defendant's funds which plaintiff is able to trace; that judgment be entered in favor of plaintiff in the amount of \$73,145.12 plus interest at the rate of ten percent per annum from September 14, 1989; that the stays issued by this court on the remainder of the Clerk's account in this matter remain in effect until final judgment; and that the cost of this action be paid by defendant.

Defendant submits fourteen objections to the referee's report. The court rules on these objections as follows.

Objection 1. Defendant notes that the referee's report in-

correctly cites the venue of defendant's bankruptcy case. This objection is immaterial. Overruled.

Objection 2. Defendant notes that the Clerk was ordered by the court to hold the remainder of the funds in this matter following payment to Manley. Defendant then contends that the referee should have recommended judgment in favor of plaintiff only in the amount paid to Manley. Defendant's contention is not well-taken. His liability to plaintiff is the full amount of the damage to plaintiff, \$73,145.12 plus interest at the rate of ten percent per annum from September 14, 1989. The funds on hold by the Clerk may assist plaintiff in its efforts to collect judgment, but they may not be used to reduce defendant's liability. Overruled.

Objection 3. Defendant notes that this matter has not been joined with *City of Dayton v. Kuntz*, the case in which this court ordered distribution. Defendant then contends that the referee's recommendation in this case may not affect the stay granted Manley in *City of Dayton v. Kuntz*. Defendant is correct. This issue does not, however, affect defendant's liability in this matter. Sustained.

Objection 4. Defendant contends that the referee "failed to correctly analyze the case on a transaction basis." Specifically, defendant contends that he was a holder in due course of the cashier's check at the time he deposited it into his account. Consequently, according to defendant, he is exempt pursuant to R.C. 1303.28 from imposition of a constructive trust. The court finds, however, that the referee thoroughly examined plaintiff's issuance of the cashier's check and found that it was a mistaken negotiation. This finding is amply supported by the evidence. Defendant was not a holder in due course. Overruled.

Objection 5. Defendant questions the referee's finding that defendant had no authority to deposit the Clerk's check without Manley's endorsement. Defendant contends that "it is ambiguous whether [the Clerk's check] is a two-party check/joint payee." The court finds that this issue was also thoroughly examined by the referee and that her finding is

overwhelmingly supported by the evidence. The check was clearly a joint payee check. Overruled.

Objection 6. Defendant contends that the "referee's report failed to consider the testimony of defendant with regards to the issuance of the cashier's check." The report, however, clearly reflects that the referee did consider Kuntz's stated reasons for his actions. After such consideration, the referee found that Kuntz had violated the court order of distribution. This finding is reasonable and is supported by the evidence. Overruled.

Objection 7. Defendant contends that the referee failed to consider the importance of the fact that the Clerk's check contained the restriction "void if not cashed in 60 days." Defendant asserts that he had no recourse but to deposit the check because of time constraints. Defendant, however, deposited the check only twenty days after the order of distribution. Defendant had ample time to either comply with Manley's instructions or to obtain Manley's endorsement. This contention was also properly considered by the referee and rejected. Overruled.

Objection 8. Defendant contends that the referee "failed to consider the true effect of the missing Manley endorsement." Defendant asserts that Manley's instructions were contained in a letter accompanying the check and were not on the check itself. Defendant does not assert that he did not notice or did not comprehend Manley's instructions. He simply asserts that, since the instructions were not on the check itself, they are ineffectual. Consequently, according to defendant, his depositing the check contrary to Manley's instructions was not improper. Defendant further contends that plaintiff constructively provided Manley's endorsement, and that such constructive endorsement was proper pursuant to R.C. 1304.11(A) (UCC 4-205(A)). These contentions are entirely baseless. First, the check was clearly a joint payee check. Second, defendant's argument is not consistent with the law. The Code Section cited by defendant, R.C. 1304.11(A), permits a depository bank to supply its customer's endorsement only when the check was deposited by the

customer or credited to his account. Here, Manley was not a customer of plaintiff nor did Manley deposit the check. Overruled.

Objection 9. Defendant contends that the referee failed to consider whether plaintiff had a valid defense of its actions with regard to a challenge by the Clerk. In other words, defendant asserts that plaintiff had no duty to correct its mistake. This contention is also baseless. First, plaintiff certainly had a duty to correct its mistake. *Ed Stinn Chevrolet v. National City Bank*, 28 Ohio St. 3d 221 (1986). Second, this issue has no effect upon defendant's liability for his actions. Overruled.

Objection 10. Defendant contends that plaintiff has failed to show a "step-by-step linkage" between the order of distribution and the present balance of funds in this matter. This contention is irrelevant to the issue of whether defendant violated the order of distribution and improperly benefited from such violation. That issue was thoroughly reviewed by the referee and her finding is supported by the evidence. Overruled.

Objection 11. Defendant contends that the referee failed to rule on plaintiff's motion in limine and that this failure prejudiced defendant in his presentation of evidence. The court finds no prejudice to defendant in this regard. The referee explained prior to the hearing that she agreed with the "general spirit of the motion," but would "reserve judgment until the evidence is actually attempted to be introduced." Then throughout the hearing both parties objected to the admission of certain evidence at various times and the referee ruled on each objection. Overruled.

Objection 12. Defendant contends that the referee failed to consider two cases, *Hutzler v. Hertz Corp.*, 39 N.Y. 2d 209, 347 N.E. 2d 627 (1976), and *Sonnenberg v. Manufacturers Hanover Trust Co.*, 87 N.Y. Misc. 2d 205 (1976), which defendant asserts are the landmark cases on point. The court does not agree with defendant's contention. First, the cases are not on point. The question in *Hutzler* was which of two innocent parties should bear the loss caused by an at-

torney's dishonest acts. *Sonnenberg* involved an intermediary collecting bank and a forged endorsement. Second, there is sufficient Ohio case law on the issue at bar. See *Ed Stinn Chevrolet v. National City Bank*, 28 Ohio St. 3d 221 (1986); *Cincinnati Insurance Co. v. First National Bank*, 63 Ohio St. 2d 220 (1980). Overruled.

Objection 13. Defendant via this objection attempts to "renew" his motions to dismiss which the referee recommended be denied in an entry dated March 2, 1990. The court has reviewed the referee's recommendation and finds that defendant's motions were properly denied. Overruled.

Objection 14. Defendant contends that the referee erred in not requiring the "docketing" of the Manley deposition. The court finds, however, that a transcript of the deposition was filed with the Clerk and that relevant portions of the deposition were read into the record. Overruled.

In accordance with the foregoing, the recommendations of the referee are adopted with one modification. The modification is that determination of this case will not affect the stay ordered by the Honorable Judge Brown on the funds held by the Clerk of Courts in this matter.

Defendant and counsel for plaintiff should take note that this decision is also in the form of a judgment entry. Therefore, the time for prosecuting an appeal to the Second District Court of Appeals must be computed from the date upon which this decision and entry is filed.

The above captioned case is ordered terminated upon the docket records of the Common Pleas Court of Montgomery County, Ohio. Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

SO ORDERED:

JOHN M. MEAGHER, JUDGE

**WAYNE H. DAWSON/WILLIAM B. FECHER, Attorneys
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(513) 228-4184**

**WILLIAM KUNTZ, III, Defendant, Pro Se, P.O. Box 1722,
Broadway Station, Albany, New York 12201-1722**

CATHY MILLER, Bailiff

APPENDIX B**Ohio Rev. Code Ann. § 2715.045**

(A) Upon the filing of a motion for attachment, a court may issue an order of attachment without issuing notice to the defendant against whom the motion was filed and without conducting a hearing if the court finds that there is probable cause to support the motion and that the plaintiff that filed the motion for attachment will suffer irreparable injury if the order is delayed until the defendant against whom the motion has been filed has been given the opportunity for a hearing. The court's findings shall be based upon the motion and affidavit filed pursuant to section 2715.03 of the Revised Code and any other relevant evidence that it may wish to consider.

(B) A finding by the court that the plaintiff will suffer irreparable injury may be made only if the court finds the existence of either of the following circumstances:

(1) There is present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court;

(2) The value of the property will be impaired substantially if the issuance of an order of attachment is delayed.

(C)(1) Upon the issuance by a court of an order of attachment without notice and hearing pursuant to this section, the plaintiff shall file the order with the clerk of the court, together with a praecipe instructing the clerk to issue to the defendant against whom the order was issued a copy of the motion, affidavit, and order of attachment, and a notice that an order of attachment was issued and that the defendant has a right to a hearing on the matter. The clerk then immediately shall serve upon the defendant, in the manner provided by the Rules of Civil Procedure for service of process, a copy of the complaint and summons, if not previously served, a copy of the motion, affidavit, and order of attachment, and the following notice:

(Case Caption)

"(Name and Address of the Court)
Case No. _____

NOTICE

You are hereby notified that this court has issued an order in the above case in favor of (name and address of plaintiff), the plaintiff in this proceeding, directing that property now in your possession, be taken from you. This order was issued on the basis of the plaintiff's claim against you as indicated in the documents that are enclosed with this notice.

The law of Ohio and the United States provides that certain benefit payments cannot be taken from you to pay a debt. Typical among the benefits that cannot be attached or executed on by a creditor are:

- (1) Workers' compensation benefits;
- (2) Unemployment compensation payments;
- (3) Aid to dependent children (A.D.C.);
- (4) General assistance (G.A.);
- (5) Social security benefits;
- (6) Supplemental security income (S.S.I.);
- (7) Veteran's benefits;
- (8) Black lung benefits;
- (9) Certain pensions.

Additionally, your wages never can be taken to pay a debt until a judgment has been obtained against you. There may be other benefits not included in this list that apply in your case.

If you dispute the plaintiff's claim and believe that you are entitled to possession of the property because it is exempt or for any other reason, you may request a hearing before this court by disputing the claim in the request for hearing form, appearing below, or in a substantially similar form, and delivering the request for hearing to this court at the above address, at the office of the clerk of this court, no later than the end of the fifth business day after you receive this notice. You may state your reasons for disputing the claim in the space provided on the form; however, you are not required to do so. If you do state your reasons for disputing the claim,

you are not prohibited from stating any other reasons at the hearing, and if you do not state your reasons, it will not be held against you by the court and you can state your reasons at the hearing. If you request a hearing, it will be held within three business days after delivery of your request for hearing and notice of the date, time, and place of the hearing will be sent to you.

You may avoid a hearing but recover and retain possession of the property until the entry of final judgment in the action by filing with the court, at the office of the clerk of this court, not later than the end of the fifth business day after you receive this notice, a bond executed by an acceptable surety in the amount of \$_____.

If you do not request a hearing or file a bond before the end of the fifth business day after you receive this notice, possession of the property will be withheld from you during the pendency of the action. Notice of the dates, times, places, and purposes of any subsequent hearings and of the date, time, and place of the trial of the action will be sent to you.

Clerk of the Court

Date"

(2) Along with the notice required by division (C)(1) of this section, the clerk of the court also shall deliver to the defendant a request for hearing form together with a postage-paid, self-addressed envelope or a request for hearing form on a postage-paid, self-addressed postcard. The request for hearing shall be in substantially the following form:

"(Name and Address of Court)
Case Number _____ Date _____

REQUEST FOR HEARING

I dispute the claim for possession of property in the above case and request that a hearing in this matter be held within three business days after delivery of this request to the court.

I dispute the claim for the following reasons:

(Optional)

(Name of Defendant)

•

(Signature)

(Date)

WARNING: IF YOU DO NOT DELIVER THIS REQUEST FOR HEARING OR A REQUEST IN A SUBSTANTIALLY SIMILAR FORM TO THE OFFICE OF THE CLERK OF THIS COURT WITHIN FIVE (5) BUSINESS DAYS OF YOUR RECEIPT OF IT, YOU WAIVE YOUR RIGHT TO A HEARING AND POSSESSION OF THE PROPERTY WILL BE WITHHELD FROM YOU DURING THE PENDENCY OF THE ACTION."

(D) The defendant may receive a hearing in accordance with section 2715.043 [2715.04.3] of the Revised Code by delivering a written request for hearing to the court within five business days after receipt of the notice provided pursuant to division (C) of this section. The request may set forth the defendant's reasons for disputing the plaintiff's claim for possession of property. However, neither the defendant's inclusion of nor his failure to include such reasons upon the request constitutes a waiver of any defense of the defendant or affects the defendant's right to produce evidence at any hearing or at the trial of the action. If the request is made by the defendant, the court shall schedule a hearing within three business days after the request is made, send notice to the parties of the date, time, and place of the hearing, and hold the hearing accordingly.

(E) If, after hearing, the court finds that there is not

12a

probable cause to support the motion, it shall order that the property be redelivered to the defendant without the condition of bond.

